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December 6, 2013

The Honorable Lisa Posthumus Lyons
Chairperson, House Committee on Elections and Ethics
Anderson House Office Building
124 North Capitol Avenue
P.O. Box 30014
Lansing, MI 48909-7514

Re: Senate Bill 661

Dear Chairperson Lyons and Members of the Committee:

As President of Michigan Defense Trial Counsel (MDTC), I am writing in order to comment upon SB 661, which is intended to amend the Michigan Campaign Finance Act (MCFA). More specifically, we are writing in order to comment upon and oppose subsection 6(2)(j) of SB 661 as it applies to judicial campaign expenditures. We submit the following comments and objections.

Statement of Facts

1. MDTC is a nonprofit corporation organized and existing to advance the knowledge and improve the skills of civil litigation attorneys, to support improvements in Michigan's civil litigation system, and to broadly address the interests of the legal community in Michigan. Membership in MDTC is limited to members who are in good standing with the State Bar of Michigan and who have as their primary focus the representation of parties in civil litigation.
2. The members of MDTC are interested parties whose course of action in upcoming judicial elections and in disqualification decisions would be affected by the applicability of the MCFA to electioneering communications concerning judicial candidates.
3. The MCFA generally requires those making political "expenditures" to disclose the source of funding for such expenditures.
4. Based upon an April 2004 interpretive statement issued by the Department of State, expenditures for advertisements are not subject to disclosure under the Act, unless the ads expressly advocate the election or defeat of a candidate. This is often referred to as the express advocacy or

MDTC

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"magic words" standard. Communications which do not satisfy this standard are considered to be "issue advocacy", and expenditures for such communications are not required to be reported to the Department of State's campaign finance reporting system.

5. The MCFA does not mention "express advocacy" or "issue advocacy", but does define "expenditure" as including "a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate. . .".¹ In pertinent part, the definition excludes any communication that "does not support or oppose a ballot question or candidate by name or clear inference."

6. Application of the express advocacy standard to judicial elections has come under increasing scrutiny and criticism over the last five years, culminating in the call for full and open disclosure of all judicial campaign spending as one of the recommendations of the Michigan Judicial Selection Task Force.² In the course of its report, the Task Force noted that "[o]ver the last decade, more than half of all spending on supreme court races in Michigan went unreported (and therefore the sources went undisclosed)."³ The Task Force also described the harmful consequences of concealing judicial campaign expenditures from public view:

"Secret spending on campaigns is harmful in two ways: it can confuse voters about the messages they rely upon to assess the candidates, and it obscures financial contributions that might cause apparent conflicts of interest and require justices' recusal from cases involving those donors. Both problems undermine the public's respect for the courts and diminish democratic accountability."⁴

7. On September 7, 2013, the State Bar of Michigan issued a written request for the Secretary of State to issue a declaratory ruling that all payments for communications referring to judicial candidates be considered "expenditures" for purposes of the MCFA, and thus reportable to the Secretary of State, regardless of whether such payments entail express advocacy or its functional equivalent.

8. On November 14, 2013, the Secretary of State declined to issue the interpretive ruling requested by the State Bar, but proposed a new rule that

¹ MCL 169.206(1).

² <http://www.michbar.org/generalinfo/pdfs/4-27-13JSTF.pdf>

³ Report and Recommendations of the Michigan Judicial Selection Task Force (April 2012), p. 4. Statistics regarding Michigan Supreme Court Campaign Finance are also available from the Michigan Campaign Finance Network at http://www.mcfn.org/MSC1984_2012.php.

⁴ Report and Recommendations of the Michigan Judicial Selection Task Force (April 2012), p. 4.

would require reporting on issue ads in the 30 days leading up to a primary election or 60 days before a general election.

9. On November 14, 2013, following announcement of the new rule proposed by the Secretary of State, the Senate Committee on Local Government and Elections added subsection 6(2)(j) to SB 661. This subsection of the bill provides that the term "expenditure" does not include "expenditure for a communication if the communication does not in express terms advocate the election or defeat of a clearly identified candidate so as to restrict the application of this act to communications containing express words of advocacy of election or defeat, such as 'vote for', 'elect', 'support', 'cast your ballot for', 'smith for governor', 'vote against', 'defeat', or 'reject'."

10. SB 661 was passed by the Senate on November 14, 2013, and is now pending before the House Committee on Elections and Ethics.

Discussion

There are three main reasons why all payments for communications referring to judicial candidates should be considered "expenditures" for purposes of the MCFA, and thus reportable to the Secretary of State.

First, as already noted above, secret spending on election campaigns impairs the ability of the electorate to make informed decisions and give proper weight to various speakers and messages. Moreover, secret spending obscures financial contributions that might cause apparent conflicts of interest and therefore require the recusal of judges from cases involving those donors. Both of these problems undermine public respect for the courts, threaten the continued integrity of our judicial system and diminish democratic accountability.

Second, the "magic words" test has been repeatedly rejected as a standard for determining the constitutionality of statutes regulating the disclosure of campaign finance. Although the test was initially adopted by the United States Supreme Court in *Buckley v. Valeo* as a means of avoiding potential unconstitutionality,⁵ the Court subsequently clarified that the magic words test is not a constitutional standard.⁶ The Court rejected the premise that "*Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech."⁷ Thus the Court "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy."⁸ The Court recognized that any claim of a constitutionally mandated barrier between express advocacy and so-called issue advocacy "cannot be

⁵ *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

⁶ *McConnell v. FEC*, 540 U.S. 93, 193, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003).

⁷ *McConnell*, 540 U.S. at 190.

⁸ *McConnell*, 540 U.S. at 194.

squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.”⁹ The Court further recognized that it is permissible to regulate not only communications containing the “magic words”, but also communications that were “the functional equivalent” of express advocacy.¹⁰

Significantly, the Court has also stated that the magic words test was “functionally meaningless.”¹¹ As the Court observed:

“Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election.”¹²

More recently, Chief Justice Roberts recognized that an ad qualifies as the functional equivalent of express advocacy “if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”¹³

Whatever validity the distinction between express and issue advocacy might have in other aspects of election reform, it has no bearing upon the First Amendment implications of election finance disclosure requirements. Disclosure requirements “do not prevent anyone from speaking”.¹⁴ As Justice Kennedy wrote in *Citizens United v. FEC*,¹⁵ “disclosure is a less restrictive alternative to more comprehensive regulations of speech.”¹⁶ On this basis, Justice Kennedy rejected the contention that disclosure requirements must be limited to speech that is the functional equivalent of express advocacy¹⁷, and further recognized that the transparency engendered by such disclosure “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”¹⁸ Similarly, the United States Court of Appeals for the Seventh Circuit has

⁹ *McConnell*, 540 U.S. at 193.

¹⁰ *McConnell*, 540 U.S. at 206.

¹¹ *McConnell*, 540 U.S. at 193.

¹² *Id.*

¹³ *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469–470, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007).

¹⁴ *McConnell*, 540 U.S. at 201.

¹⁵ 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

¹⁶ *Citizens United v. FEC*, 558 U.S. at 369.

¹⁷ *Id.*

¹⁸ *Citizens United v. FEC*, 558 U.S. at 371.

stated that "the wooden distinction between express advocacy and issue discussion does not apply in the disclosure context."¹⁹ In the same decision, the Seventh Circuit went on to state as follows:

"[M]andatory disclosure requirements are constitutionally permissible even if ads contain no direct candidate advocacy and 'only pertain to a commercial transaction.' . . . Whatever the status of the express advocacy/issue discussion distinction may be in other areas of campaign finance law, *Citizens United* left no doubt that disclosure requirements need not hew to it to survive First Amendment scrutiny. With just one exception, every circuit that has reviewed First Amendment challenges to disclosure requirements since *Citizens United* has concluded that such laws may constitutionally cover more than just express advocacy and its functional equivalents, and in each case the court upheld the law."²⁰

Finally, the attempted distinction between express and issue advocacy never had any relevance as applied to judicial elections. Typically, issue ads are distinguished from express candidacy ads on the basis that they promote the discussion of public policy issues, and seek to mobilize constituents, policy makers, or regulators in support of or in opposition to current or proposed public policies.²¹ Judges, however, unlike other elected officers, are not supposed to be influenced by so-called "issue advocacy" outside the courtroom. Judicial decision-making must be based solely upon the facts of the case before the court and the law as it applies to those facts. The Michigan Code of Judicial Conduct, Canon 3.A.(1) requires that a judge "be faithful to the law . . ." This same Canon also requires that "[a] judge should be unswayed by partisan interests, public clamor, or fear of criticism." The argument for issue advertising is even more strained as applied to judicial candidates who are not current office holders, and therefore not in any position to make public policy. In other words, issue advocacy is often nothing more than thinly veiled candidate advocacy, but the veil is utterly transparent in the context of judicial elections.

Conclusion

This is an issue of tremendous significance to the continued integrity of our judicial system. MDTC joins in the statements by others who have appeared before this committee, and emphasized the necessity for transparency in the matter of campaign finance, particularly as it applies to judicial elections. All payments for communications referring to judicial candidates should be considered "expenditures" for purposes of the MCFA, and thus reportable.

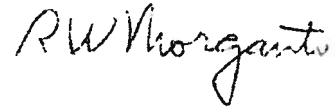
¹⁹ *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir., 2012).

²⁰ *Id.*

²¹ See, e.g., *FEC v. Wis. Right to Life, Inc.*, 551 U.S. at 470.

We thank you for your consideration of this statement in opposition to SB 661. If you have any questions, or would like further information, feel free to contact me at (248) 213-2013.

Sincerely,

A handwritten signature in black ink, appearing to read "RW Morganti". The signature is written in a cursive, flowing style.

Raymond W. Morganti